IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 32 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

OMPRAKASH GOEL

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 32 of 2004

MR RS SANJANWALA for Petitioner No. 1

MS PJ DAVAWALA for Respondent No. 1-2

RULE SERVED BY DS for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 12/03/2004

ORAL JUDGEMENT

By way of filing the present petition under

Article 226 of the Constitution of India, the petitioner who is the father of the detenu, has challenged an order dated 18/12/03, placed at Annexure 'A' page 1, whereby the detenu was detained in accordance with the provisions made in Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "COFEPOSA"). The detaining authority has recorded a finding that the detenu was required to be detained with a view to preventing him from smuggling goods in future.

2. The petitioner has challenged the said order on several grounds. It has been contended that the documents relied upon by the detaining authority, for the purpose of deciding the issue of detention, have not been supplied to the detenu. It has also been contended that certain documents which were necessary for preparing and submitting representation to the appropriate authority in accordance with Clause 5 of Article 22 of the Constitution of India, were not provided to the detenu despite his demand. Therefore, the detenu was not able to submit effective representation to the appropriate authority. It has also been contended, apart from the merits of the case, that the detenu had undertaken not to enter into activities of export and import of goods on E.O.U. facilities and therefore also, the further detention of the detenu could be done away with.

3. On the aforesaid considerations, it has been contended that the order of detention is not legal and therefore, it is required to be quashed. The petitioner has, therefore, prayed that the order of detention may be set aside and the detenu may be ordered to be set at liberty forthwith.

4. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.P J Davawala learned Addl. Standing Counsel for Union of India has appeared for respondents no.1 and 2, whereas Ms.M S Panchal learned AGP has appeared for respondent no.3. The parties have submitted documents on record. During the course of their arguments, they have taken me through the said documents on record.

5. During the course of his arguments, the learned advocate for the petitioner has mainly argued that certain documents were referred to and relied upon in the order of detention and yet, the same have not been supplied to the detenu. He has further contended that certain documents which were required for submitting representation, have not been supplied to the detenu,

despite his demand. Therefore, the detenu was deprived of submitting his representation and hence, a valuable right of submission of representation under Article 22(5) of the Constitution of India, has been taken away.

6. In order to support the said contention, the learned advocate for the petitioner has taken me through a communication addressed to the Joint Secretary of the Union of India dated 31/12/03 placed at Annexure 'C' page 20 to the petition. From page 22 onwards, we find lists of documents which were demanded by the detenu. There is no serious dispute amount the same. It is not much in dispute that this communication was received by the respondents and that the detenu had demanded the documents shown in the said communication dated 31/12/03. It is also not much in dispute that these documents were not supplied to the detenu.

7. The learned advocate for the detenu has argued at length that these are all relevant documents which were required for the purpose of submitting effective representation as above. He has also contended that the detenu was under detention and therefore, though some of the documents were easily available with him, the same were not on hand, as he was under detention.

8. It has to be accepted that some documents may be available with the detenu at his residence or office. But, after the detenu was detained, the said documents were not on hand with the detenu. Therefore, he had no alternative, but, to demand those documents from the respondents - Union of India.

9. On the other hand, the learned Addl.Standing Counsel for the respondents has argued the matter at length stating that these are not the documents which were relied upon and therefore, it was necessary to supply them to the detenu.

10. It has also been contended that the detaining authority had considered the previous show cause notices issued to the detenu by the first respondent and that the replies submitted by the detenu to these notices have not been considered by him.

11. On this point, the learned Addl. Standing Counsel for the respondents has argued that these documents were not considered for the purpose of detaining the detenu, and therefore, it was not necessary for the respondents to supply copies of the replies to the show cause notices.

12. In order to appreciate the above arguments, we can turn to the detention order and the accompaniments thereto. Here, we can find a list of documents which were relied upon by the detaining authority for passing the order of detention against the detenu. The said list has been appended to the detention order and the same has been supplied to the detenu, at the time when the detenu was served with the order of detention. If we go through the list of the said documents, we can find that it is a list of 76 documents running into about 861 pages. It would be relevant to refer to certain documents at Sr.Nos. 60, 62, 64 and 66. They are the previous show cause notices dated 25/07/03, 21/05/03, 30/10/02 and 06/12/03 respectively.

13. These are the documents which are shown to have been relied upon by the detaining authority for the purpose of passing the order of detention against the detenu. There cannot be any dispute about the same.

14. The learned Addl. Standing Counsel for the respondents has contended that the previous show cause notices were simply referred and they had no bearing on the detention order and the same were not considered for the purpose of passing an order of detention against the detenu. That, since they were not relied upon, it was not necessary to supply copies to the replies thereto to the detenu.

15. It is difficult to accept the said argument, in view of the fact that a list of "relied upon documents" had been supplied to the detenu and along with the said list, copies of documents relied upon by the detaining authority, were also supplied to him. From the compilation, it can be gathered that the above show cause notices found place in the above list. Even in the compilation, the copies of those show cause notices have been included. Once the compilation shows that the above documents were incorporated in the list and once it is found that the copies of the said show cause notices were actually supplied to the detenu and that they have been referred to as "relied upon documents", then in that event, it would not be open to the respondents now to say that the said show cause notices were simply referred to by the detaining authority, during the course of the detention order and that they have not been relied upon by the detaining authority, for the purpose of passing the order of detention. In my reading of the list of documents, the said show cause notices form a part of the process of detention order. In other words, I am of the

opinion that the show cause notices referred to hereinabove and included in the list of relied upon documents, were considered by the detaining authority for the purpose of passing the order of detention.

16. Now, when the detaining authority had considered the show cause notices referred to above for the purpose of passing the order of detention, then, it was incumbent on the part of the detaining authority to consider the replies sent to the show cause notices by the detenu. The detenu has come out with a case that all those show cause notices were replied to by him. I find that there is no serious dispute about the same. In other words, the detenu had sent replies to the aforesaid show cause notices of the respondent.

17. Now, if we go through the above list of relied upon documents and if we go through the compilation, we notice that the replies to the show cause notices did not find place in the list of relied upon documents, nor did they find place in the compilation itself. In other words, the replies to the show cause notices have not been included in the list of relied upon documents. Same way, copies thereof were not supplied to the detenu, as the same are absent in the compilation of documents supplied to the detenu.

18. It may be noted here that it is not the case of the respondents that the copies of the replies to the show cause notices have actually been supplied to the detenu, but, they have not been included in the list of relied upon documents supplied to the detenu. This clearly indicates that replies to the show cause notices have not been supplied to the detenu.

19. If we view the matter from a different angle, it can be gathered that the said replies were not placed for consideration before the detaining authority, at the time when the detention order was passed against the detenu. In other words, the detaining authority did consider and rely upon the show cause notices referred to above and served upon the detenu. At the same time, the detaining authority did not consider the replies to the said show cause notices, while passing an order of detention against the detenu.

20. So, on the one hand, the replies to the show cause notices were not placed before the detaining authority and on the other hand, the detaining authority did not consider the replies to the show cause notices. The detaining authority did not supply copies of those

replies to the detenu at the time when the detention order was passed and copies of other documents were supplied. The respondents also did not supply the said copies of the said replies to the detenu, despite his demand in writing. These facts emerge from the compilation of papers and from the arguments of the learned advocates for the parties.

21. As said above, the argument of Ms.Davawala that the show cause notices were merely referred in the detention order but were not considered or relied upon for the purpose of detaining the detenu, cannot be accepted, in view of the above position in general and in particular, the position that the show cause notices were included in the list of the relied upon documents.

22. Even on going through the order of detention, it can be gathered that the detaining authority has considered cumulative effect of past antecedents and history of the detenu. On going through the said order, it can be said that the order of detention recorded by the detaining authority, was not solely based on the appreciation of the incident of September, 2003. It also appears that while appreciating the circumstances of the incident of September, 2003, the detaining authority has also considered the past antecedents and history of the detenu. In so doing, the detaining authority appears to have considered the aforesaid show cause notices. It may be that the detaining authority might not have passed an order of detention against the detenu, had the said episode of September, 2003, was the solitary episode, without having any adverse past antecedents against the detenu. In other words, the previous antecedents of the detenu may not be the basis for passing an order of detention. However, in view of the occurrence of the incident of September, 2003, inquiry was made and while inquiring into the matter, the antecedents of the detenu adverse to him were brought on record and were considered for the purpose of passing the detention order. Therefore, it cannot be said that the past antecedents of the detenu were not considered by the detaining authority while passing the order of detention. In other words, the past antecedents were considered by the detaining authority, while passing the impugned order against the detenu. While so supplying the said documents, the earlier show cause notices, referred to above, have also been supplied to the detenu, which clearly indicates that the said show cause notices were actually considered by the detaining authority. Further, even on looking into the order of detention, there is a clear reference to the aforesaid show cause notices. In other words, while

passing the order of detention, the past antecedents of the detenu have been taken into consideration and in so doing, the earlier show cause notices have been considered by the detaining authority. It, therefore, cannot be said that the previous show cause notices have simply been casually referred and that they were not considered by the detaining authority for the purpose of passing the order of detention against the detenu.

23. Once it is found that the earlier show cause notices were considered by the detaining authority for the purpose of passing the impugned order, it was necessary for the detaining authority to consider the replies sent by the detenu to the said show cause notices. If the show cause notices and replies to them had been considered, then and then, it could be said that the detaining authority had objectively decided the matter on subjective satisfaction. With a view to introduce objectivity in the order itself, it was necessary for the respondent to consider both the sides of the coin, i.e. the show cause notices and the replies to the show cause notices sent by the detenu. If the replies are not considered, then the detaining authority may not have two eyed view in coming to a just decision. I am, therefore, of the view that when the detaining authority had an occasion to consider the earlier show case notices issued to the detenu, it was necessary for him to consider the replies received from the detenu, for the purpose of a just decision.

24. As said above, the replies to the show cause notices do not appear to have been placed before the detaining authority. It also appears that the detaining authority did not call for the said replies before passing the order of detention. It further appears that the replies to the show cause notices were never considered by the detaining authority while passing the order of detention.

25. Even otherwise, there is absolutely no material on record to show that the said replies were considered by the detaining authority before passing the impugned order. Even, the learned Addl. Standing Counsel did not point out from the affidavit filed on behalf of the respondent that the replies to the show cause notices were placed before the detaining authority or that they were taken into consideration by the detaining authority. In that view of the matter, it is amply clear that the replies to the show cause notices were not considered by the detaining authority.

26. It is not much in dispute that the copies thereof have not been supplied to the detenu. It is also not much in dispute that the same have not been supplied to him, even, despite his demand. These facts emerge from the records and from the arguments advanced by the learned advocates for the parties.

27. Then it would be appropriate to consider certain decisions on this aspect;

(i) In Babulal Sundarji Bhanushali V/s. State of Gujarat & Ors. reported in 1986(1) GLR 704, it has been observed by a Division Bench of this Court that the Sponsoring Authority is under a duty to place before the Detaining Authority, all the material which may have the tendency to affect the decision of the Detaining Authority and if it fails in so doing, then it would affect the validity of the order of detention.

(ii) In M. Ahmedkutty V/s. Union of India & Ors. reported in (1990) 2 SCC 1, the Hon'ble the Apex Court had an occasion to deal with an issue as to supply of relevant materials to the detenu. It would be appropriate to refer to the observations made by the Hon'ble the Apex Court in paras 19, 20 and 27.

"Para 19 : The next submission is that of non-supply of the bail application and the bail order. This Court, as was observed in Mangalbhai Motiram Patel V. State of Maharashtra has 'forged' certain procedural safeguards for citizens under preventive detention. The constitutional imperatives in Article 22(5) are twofold : (1) The detaining authority must, as soon as may be, i.e. as soon as practicable, after the detention communication to the detenu the grounds on which the order of detention has been made, and (2) The detaining authority must afford the detenu the earliest opportunity of making the representation against the order of detention. The right is to make an effective representation and when some documents are referred to or relied on in the grounds of detention, without copies of such documents, the grounds of detention would not be complete. The detenu has, therefore, the right to be furnished with the grounds of detention along with the documents so referred to or relied on. If there is failure or even delay in furnishing those

documents it would amount to denial of the right to make an effective representation. This has been settled by a long line of decisions: Ramchandra A. Kamat V. Union of India, Frances Coralie Mullin V. W.C.Khambra, Ichhu Devi Choraria V. Union of India, Pritam Nath Hoon V. Union of India, Tushar Thakker V. Union of India, Lallubhai Jogibhat Patel V. Union of India, Kirit Kumar Chaman Lal Kundaliya V. Union of India and Ana Carolina D'Souza V. Union of India.

Para 20 : It is immaterial whether the detenu already knew about their contents or not. In Mehrunissa V. State of Maharashtra it was held that the fact that the detenu was aware of the contents of the documents not furnished was immaterial and non-furnishing of the copy of the seizure list was held to be fatal. To appreciate this point one has to bear in mind that the detenu is in jail and has no access to his own documents. In Mohd. Zakir V. Delhi Administration it was reiterated that it being a constitutional imperative for the detaining authority to give the documents relied on and referred to in the order of detention pari passu the grounds of detention, those should be furnished at the earliest so that the detenu could make an effective representation immediately instead of waiting for the documents to be supplied with. The question of demanding the documents was wholly irrelevant and the infirmity in that regard was violative of constitutional safeguards enshrined in Article 22(5).

Para 27 : Considering the facts in the instant case, the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. We have, therefore, no alternative but to hold that it amounted to denial of the detenu's right to

make an effective representation and that it resulted in violation of Article 22(5) of the Constitution of India rendering the continued detention of the detenu illegal and entitling the detenu to be set at liberty in this case."

(iii) Even in Kurjibhai Dhanjibhai Patel V/s. State of Gujarat & Ors. reported in 1985 (1) SCALE 964, it has been held that if it is found that vital material was not placed before the detaining authority by the sponsoring authority, then the detention order was liable to be quashed.

28. It is, therefore, clear that not only the show cause notices, but the replies thereto, were relevant considerations, which would be required to be placed before the detaining authority by the sponsoring authority.

29. It is also required to be considered here that consideration to show cause notices would be one sided view of the matter. The case of the Department only would be reflected in the show cause notices. The case of the detenu would naturally not be reflected therein. The detenu's case would be reflected only in reply to the show cause notices. Therefore, with a view to have a two-eyed view, it would be necessary to have consideration also to the replies to the show cause notices. The Department cannot look at one side of the coin while avoiding to look at the other side thereof. It is well settled that the competent authority is required to act in a just and fair manner, in order to demonstrate that he/she has acted in a just and fair manner. It would be expected of him/her that he/she considers the pros and cons of the matter placed before him/her. This can be done only if he/she looks at the replies to the show cause notices, while looking at the notices to show cause. In other words, to consider only the show cause notices and to omit to consider the replies thereto, would be a contradictory stand on the part of the detaining authority itself.

30. On the other hand, the learned Addl. Standing Counsel for the Union of India has relied upon the following decisions;

30.1 In Jeevan G. Tandel V/s. Union of India & Ors. reported in 1996(1) GLH 419, while dealing with the case of detention under COFEPOSA, this Court had an occasion to observe

that the detaining authority is not under constitutional obligation to supply documents to the detenu which are neither relied on nor referred to in the grounds of detention. There the detenu was declared as an absconder u/s.7(1)(b) of the COFEPOSA, as he was evading detention. The detenu was directed to appear before the Addl. Director General of Police C.I.D. (Crime & Railway), Ahmedabad vide Notification dated 28/07/93. The report of the Addl. D.G.P. and the Notification declaring the detenu as an absconder, were not taken into consideration for passing an order of detention. Those documents were neither relied on nor referred to in the grounds of detention. Therefore, this Court had observed that the detenu's right to make effective representation was not violated by not supplying the said documents.

* It is pertinent to note that those documents had come into existence subsequent to the passing of detention order and therefore, there was no question for the detaining authority to supply them to the detenu.

30.2 In Madan Lal Anand V/s. Union of India and Ors. reported in (1990) 1 SCC 81, it has been observed that documents having bearing on the subjective satisfaction of detaining authority but not relied upon by him, must be placed before the detaining authority at the time of passing of detention order.

* However, it has also been observed that if the documents are such that even in their absence subjective satisfaction would not be affected, then failure to place the documents before the detaining authority would be immaterial.

* It has also been observed therein that where detaining authority relied upon and referred to confessional statement of detenu in the grounds of detention, it would be desirable that any retraction made, should also be placed before the detaining authority at the time of passing detention order.

* It has further been observed that the detention order would not become invalid merely

on failure to place such retraction before the detaining authority. The Hon'ble the Supreme Court also observed therein that when the goods was imported in the name of fictitious firms under exemption scheme and sold in local market in violation of conditions of import licence to manufacture products with them and export within 6 months, thus evading huge export duty and making profits and that though the term of the licence had expired, detention order cannot be quashed on the ground of no more chances of detenu's involvement in smuggling activities were there.

31. From the above discussion, it is clear that the show cause notices were actually considered by the detaining authority for the purpose of passing the impugned order of detention. It is not much in dispute that the replies thereto were not placed before him and were not, therefore, considered by him. It is also not much in dispute that the copies thereof have not been supplied to the detenu at the time when the detention order was passed. It is also not in dispute that copies thereof were not supplied to the detenu despite his demand.

32. In above view of the matter, I am of the view that looking to the records made available to the Court, it is amply clear that the show cause notices were taken into consideration for the purpose of passing the impugned order. When the show cause notices were taken into consideration, the replies thereof ought to have been considered by the detaining authority. This has not been done and therefore, the objectivity has not been introduced to the order in question.

33. Moreover, when the replies to the show cause notices were not supplied to the detenu despite his demand, then in that case, a valuable right of the detenu to submit effective representation against the detention, in accordance with Article 22(5) of the Constitution, has been defeated.

34. In above view of the matter, when required copies have not been supplied and when his constitutional right has been affected adversely, then in that case, further detention cannot be sustained.

35. So, on the one hand, the detaining authority has not considered the replies to the show cause notices received from the detenu and on the other hand, the

required copies have not been supplied to the detenu despite his demand, which has defeated the constitutional right of the detenu, as envisaged under Article 22(5) of the Constitution of India.

36. In above view of the matter, the order of detention cannot be held to be legal and valid. When the order of detention is found to be vitiated on the ground of non-supply of relevant copies and on non-consideration of required documents, it would not be necessary to take into consideration the remaining arguments of Mr.Sanjanwala saying that the detenu undertakes to refrain from entering into export - import activities on E.O.U. facility basis. Therefore, the said aspect is not required to be considered and hence, it has not been considered.

37. Hence, I am of the view that when the required documents have not been considered by the detaining authority, the objectivity has been lost and consequently, the order of detention cannot be sustained in the eyes of law. On the other hand, the required copies were not supplied to the detenu at the first instance and they were again not supplied to him when they were demanded from the respondents. Therefore, on account of non-supply of required documents, the said constitutional right of the detenu has been adversely affected and consequently, further detention of the detenu would not be justified. On both these counts, in my opinion, the detenu succeeds and therefore, the order of detention is required to be held to be illegal and consequently, it is required to be set aside.

38. For the foregoing reasons, this petition is allowed. The order of detention dated 18/12/03, passed by respondent no.2 against the detenu is ordered to be quashed and set aside. Detenu, Manoj Omprakash Goel, is in detention. He is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute. Direct service permitted.

(D. P. Buch, J.)

pravin/